N RAMAKRISHNAN P NAGASAMY A

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS B

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPLICATION NO: 44-84-2007]
13 NOVEMBER 2007 C

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Applicant detained under s. 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether applicant's detention unlawful - Whether order of detention by Minister invalid - Whether habeas corpus should issue* D

PREVENTIVE DETENTION: *Detention order - Application for habeas corpus - Applicant detained under s. 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether detention unlawful - Whether Form 1 was duly served with detention order - Compliance with r. 3(1) Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 - Non-compliance with r. 3 denotes non-compliance with a mandatory procedural requirement - Order for detention may be vitiated* E

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Irregularities in making of detention order - Statutory pre-condition to making of detention order - Minister to be satisfied that it is in public interest to issue detention order - Satisfaction of Minister is a condition precedent - Whether failure to specify date when Minister was 'satisfied' constituted a breach - Whether detention order had not been validly made - Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1)* F G

Ramakrishnan a/l Nagasamy ('the detainee') was made the subject of a detention order dated 6 August 2006 ('the detention order') by the Minister for Internal Security ('the Minister') who acted pursuant to the powers granted to him under s. 6 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). In the present application, the detainee sought an order of *habeas corpus* on the grounds that the following procedural requirements had been breached: (i) a breach of Rule 3(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules') in that there was doubt created as to whether the detainee was provided at the time of H I

A the service of the detention order with copies of Form 1 by the police officer serving the detention order; and (ii) a breach of s. 6(1) of the Act in that the Minister had failed to comply with a mandatory procedural requirement in that section requiring the Minister to specify the date when he was 'satisfied' that in the
B interests of public order, the detainee should be detained. The respondents claimed that three copies of Form 1 were served on 6 August 2006 at the same time as the detention order and the grounds. The Officer in Charge of the Detention Centre in Simpang Renggam also gave evidence that he served three copies
C of Form 1 on the detainee on 7 August 2006**,** the date when the detainee was brought to the detention centre. There was a gap of some four days between the day when the Minister received the report from the Inquiry Officer on 2 August 2006 and the issuance of the order on 6 August 2006.

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Held (allowing the application for *habeas corpus* on the basis of a breach of the procedural requirements of r. 3 of the Rules):

E **(1)** The evidence showed that while Form 1 was served by the officer in charge of the detention centre, it was not clear beyond doubt that three copies of Form 1 were served by the police officer with the detention order and the grounds on 6 August 2006. In view of this doubt, it could not be stated
F with any degree of certainty that there had been full compliance with r. 3(1) of the Rules. A lack of compliance with r. 3 denotes non-compliance with a mandatory procedural requirement, which in turn has the effect of vitiating the order for detention even if no real prejudice has ensued to the
G detainee. The detainee therefore succeeded in his application for *habeas corpus*. (paras 14, 16 & 19)

(2) Pursuant to the second part of s. 6(1) of the Act, the Minister may direct by order that a person be detained but only if he is satisfied that it is in the interest of public order
H that such person be detained. As the date of satisfaction is a part of the issuance of the order, in that it merely prescribes a condition precedent, rather than setting out a separate step to be taken by the Minister, there is no requirement that the Minister set out or specify the date when he was 'satisfied'
I because it is the date of the detention order. There is no

requirement that the Minister must make his decision on whether or not to exercise his discretion immediately upon receiving the relevant reports. (paras 26, 27 & 28)

Case(s) referred to:

Aw Ngoh Leang v. Inspector General of Police & Ors [1993] 1 CLJ 373 SC ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

Lim Siong v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2008] 7 CLJ 40 HC ***(refd)***

Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 2 CLJ 1199 HC ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

Dangerous Drugs (Special Preventive Measures) Act 1985, s. 6(1)

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 3(1)

For the respondents - Tengku Amir Zaki; AG's Chambers
For the applicant - Suresh Thanabalasingam; M/s Kuldip & Co

Reported by Amutha Suppayah

JUDGMENT

Nallini Pathmanathan JC:

Introduction

[1] Ramakrishnan a/l Nagasamy ('the detainee') was made the subject of a detention order dated 6 August 2006 ('the detention order') by the Minister charged with the responsibility for internal security ('the Minister') who acted pursuant to the powers granted to him under s. 6 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act').

[2] In the application before this court, the detainee seeks an order of *habeas corpus* on the grounds that certain procedural requirements have been breached, which entitles him to be freed. The procedural irregularities of which the detainee complains are as follows:

A (i) A breach of r. 3(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('the Rules') in that there is doubt created as to whether the detainee was provided at the time of the service of the detention order with copies of Form 1 by the police officer
B serving the detention order;

(ii) A breach of s. 6(1) of the Act in that the Minister has failed to comply with a mandatory procedural requirement in that section requiring the Minister to specify the date when he was
C 'satisfied' that in the interests of public order, the detainee should be detained; this contention envisages a construction of s. 6(1) which imposes such a duty upon the Minister. Such a construction is in issue;

D In the event such a mandatory procedural requirement is to be found to comprise a constituent part of s. 6(1) of the Act, that any 'delay' between the date of receipt of the requisite reports or the date of issuance of the order and the date of the Minister's 'satisfaction' be duly explained, in keeping with
E the reasoning adopted by the Federal Court in *Kumaran Suppiah v. Dato' Hj. Mohd. Noh* [2006] 4 CLJ 675.

Issue (i): Was There A Breach Of r. 3(1) Of The Rules?

[3] Rule 3(1) provides as follows:

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> Where any person is served with a detention order, the police officer serving the detention order shall at the same time:
>
> (a) inform that person of his right to make representations
G against the detention, order; and
>
> (b) provide him with three copies of Form 1 prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.

H **Salient Facts**

[4] The detainee was first arrested and detained by the police on 8 June 2006. He was held in remand at the police station in Putrajaya for close to sixty days, and on 6 August 2006, served
I with a detention order dated 6 August 2006, issued by the Deputy Minister of Internal Security under the Act. In accordance with s. 6(1) of the Act, the Minister had received a complete report of the investigation from one Chief Inspector

Amiruddin bin Masri, the police officer making the investigation pertaining to the detainee ('Amiruddin') on 18 July 2006 as well as the report of the inquiry officer (The inquiry officer is constrained by s. 5(2) of Rules, to inquire whether are reasonable grounds for believing that the detainee has been or is associated with any activity relating to or involving the trafficking in dangerous drugs after receiving a report from the police officer making the investigation related to the detainee), one Mohamed Faizal Bin Mohamed Fedder on 2 August 2006.

[5] The issue of relevance in this application is that of the service of Form 1, which is the document entitling the detainee to specify in writing that he wishes to make representations in connection with the detention order. As stated above in r. 3(1), there is express provision in the rules that Form 1 is to be served at the same time as the detention order by the police officer serving the detention order.

[6] The police officer serving the detention order in this case was Amiruddin. He affirmed in his affidavit dated 13 July 2007, that he served the detention order, the grounds and facts on which the detention order was based ('the grounds'), as well as Form 1 on the detainee on 6 August 2006. He states that the contents of the detention order and the grounds were first translated and explained to the detainee in the Tamil language to ensure that he fully understood the same.

The Detention Order And Form 1

[7] The detention order itself comprises two pages of a pre-printed standard form document where the terms of the order of detention are inserted or typed in on the first page. On the second page of the detention order it is specified in pre-printed format that three sets of documents, namely the detention order itself, the grounds and three copies of Form 1 were served on dates which were inserted or typed in as 6 August 2006. Similarly the name of the police officer serving those documents, Amiruddin, is also typed onto the pre-printed form comprising the detention order. This form also provides for acknowledgement of service of the detention order, the grounds and three copies of Form 1 in standard form print. Page 2 of the detention order discloses that service of these three sets of documents has been complied with. The signatures of Amiruddin, the translator, one Detective Sergeant Sitaram a/l Sellappan ('Sitaram') and the detainee himself

A are evident on page 2 of the pre-printed detention order. The detention order itself as described is exhibited to Amiruddin's affidavit of 13 July 2007 as exh. 'NRPN1'. The grounds are exhibited as 'NRPN2'. However, no copy of the Form 1, of which three sets are stated to have been served on the detainee on 6 B August 2006, is exhibited in C/I Amiruddin's affidavit. *Prima facie*, on the basis of the affidavits of Amiruddin, Sitaram and the detention order, NRPN1, it would appear that there has been compliance with r. 3(1).

C **Service Of Form 1 At Simpang Renggam**

[8] Subsequently on 17 July 2007, one Nik Mohamad Faidza bin Nik Jaafar, the officer in charge of the Detention Centre in Simpang Renggam, ('Nik Faidza') affirmed an affidavit stating that he served three copies of Form 1 on the detainee on 7 August D 2006, the date when the detainee was brought to the detention centre. He states that he first explained the contents of Form 1 to the detainee in Bahasa Malaysia that was easily understood and then took the additional precaution of having one Harun bin Musa to translate once again, *inter alia*, the contents of Form 1 E to him. Nik Faidza goes on to state that, the detainee was only ready to fill in and sign Form 1 on 15 August 2006, which the detainee did in the presence and with the assistance of Harun bin Musa. The detainee then, according to Nik Faidza's affidavit, returned two filled-copies of Form 1, one of which was sent to F the advisory board by post on the same day. A copy of the Form 1 is exhibited as 'ZMD1' to the affidavit of Zakiah binti Md. Din, the secretary to the advisory board. It is apparent that 'ZMD1' is the Form 1 that was served on the detainee at the Detention Centre, as the name of the translator, Harun Musa is clearly set G out on p. 2 with his signature.

Issue: Is It Clear That Form 1 Was Served By The Police Officer Serving The Detention Order, Amiruddin as required By r. 3?

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[9] Based on the aforesaid facts, the detainee contends that doubt arises as to whether he was in fact served with three copies of Form 1 by the police officer serving the detention order, ie, Amiruddin, as specified by r. 3. In response, the respondents I maintain that by virtue of the acknowledgement on p. 2 of the detention order, it is evident that three copies of Form 1 were served on 6 August 2006 at the same time as the detention order and the grounds, as specified by r. 3.

[10] Upon a perusal of the affidavits of Amiruddin and Sitaram, as well as the affidavits of Nik Faidza and Harun bin Musa, it is evident that both the police officer and the officer in charge of the detention centre have affirmed to the fact of having served three copies of Form 1 on the detainee at different times. No copy of the Form 1 stated to have been served by the police officer Amiruddin however has been exhibited. Only the copy served by the officer in charge of the detention centre, Nik Faidza has been exhibited. While it is not a procedural requirement that a copy of the Form 1 served on the detainee be exhibited, the facts of the instant case are such that service of Form 1 has clearly been shown to have been effected at the Simpang Renggam Detention Centre by Nik Faidza, the officer in charge of the Detention Centre. And it is this copy that reached the advisory board. It is not clear what happened to the three sets of Form 1 that were said to have been served on the detainee by Amiruddin on 6 August 2006.

[11] Notwithstanding these two sets of facts which have been deposed to by two different deponents, no explanation has been put forward by these deponents or the respondents to explain if indeed three sets of Form 1 were served twice, or to state or ascertain what happened to the three copies of the Form 1 said to have been served on the detainee by the police officer serving the detention order on 6 August 2006.

[12] As such, the possibilities that arise are as follows:

(a) Was the detainee indeed served with three copies of Form 1 on 6 August 2006? or

(b) Was the detainee served twice?

[13] The respondents have contended on the other hand that it is clear from the aforesaid affidavits that Form 1 has been served twice and as such, there has been full compliance with r. 3. It would be necessary for the court to make an assumption from the contents of the affidavits of Amiruddin and Sitaram as well as Nik Faidza and Harun bin Musa that service of three sets of Form 1 was effected twice.

[14] This is because none of the respondents has clarified or stipulated by way of a clear averment that service was in fact effected twice. And if service was effected twice, none of the respondents has provided an explanation for the same. Instead,

A the affidavits by the two sets of deponents above, the absence of any explanation or exhibit in relation to the service of the first set of three copies of Form 1, coupled with clear evidence of service of a "second" set of three copies of Form 1, suggests that while Form 1 was certainly served by the officer in charge of the B Detention Centre, it is not clear beyond doubt that three copies of Form 1 were served by the police officer with the detention order and the grounds on 6 August 2006.

[15] The effect of the acknowledgement of service of three copies C of Form 1 contained in the detention order is somewhat weakened by the fact that it is in standard pre-printed form in the detention order. While such an acknowledgement would normally suffice, in the instant case, its *prima facie* effect of regular service in compliance with r. 3 is displaced by the unexplained subsequent D and full service of three sets of Form 1 by the officer of the Detention Centre, coupled with the absence of any other exhibit showing the actual service of Form 1 by the police officer serving the detention order or an explanation by the two deponents as to whether and if so, why Form 1 was served twice in this case.

E **[16]** In summary, upon a consideration of the entirety of the evidence before this court, it is not entirely without doubt whether the police officer Amiruddin did in fact effect service of three copies of Form 1 on the detainee together with the detention order and grounds on 6 August 2006. In view of this doubt, it F cannot be stated with any degree of certainty that there has been full compliance with r. 3(1) of the Rules. A lack of compliance with r. 3 denotes non-compliance with a mandatory procedural requirement, which in turn has the effect of vitiating the order for detention even if no real prejudice has ensued to the detainee. G

[17] In *Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649; Edgar Joseph Jr J (as he then was) ruled:

H > ... It matters not one whit that the detainee did in fact make representations to the Advisory Board which considered the same and made recommendations thereon which led to the detainee's detention. In other words, once a breach of a mandatory statutory requirement is established, the fact that the detainee was not prejudiced is irrelevant ... I

[18] His Lordship concluded that a failure to comply with the strict procedural requirements of service of Form 1 amounted to a breach of a mandatory procedural provision, as opposed to a directory provision. And in *Aw Ngoh Leang v. Inspector General of Police & Ors*. [1993] 1 CLJ 373 the Supreme Court held as follows:

> ... Any disobedience of the mandatory requirements for the protection of this right (Rule 3) would vitiate any order of detention made even if no real prejudice has ensued to the detainee ...

[19] It therefore follows that the detainee succeeds in his application for *habeas corpus* which is therefore granted.

2nd Issue: Has A Breach Of s. 6(1) Of The Act Been Occasioned By The Minister's Failure Or Omission To Set Out The Date When He Was 'Satisfied' That The Detainee Should Be Detained?

[20] Although the detainee has succeeded in his first ground he has also raised a further ground, namely a breach of s. 6(1) of the Act. The said section provides in full as follows:

(1) Whenever the Minister, after considering:

(a) the complete report of investigation submitted under sub-s. (3) of s. 3; and

(b) the report of the inquiry officer submitted under sub-s. (4) of s. 5,

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

[21] The section in its entirety provides that at any time after having considered the investigation report submitted by the police officer and the Inquiry officer and being satisfied that a person is involved in an activity relating to the trafficking of dangerous drugs, the Minister may by order direct that the person be detained for two years "if", ie, provided the Minister is satisfied that it is in the interest of public order to do so.

[22] From submissions of counsel for the detainee it appears that the detainee's complaint is aimed at the failure of the Minister to specify the 'date of his satisfaction' in respect of the latter part of s. 6(1), rather than the first part of s. 6(1) which also requires the Minister's satisfaction in respect of the reports from the police officer investigating the matter and the inquiry officer.

[23] The detainee's complaint is that a reading of the Deputy Minister's affidavit shows that he received the report from the investigation officer on 18 July 2006 and the inquiry officer on 2 August 2006. The detention order is dated 6 August 2006. On the assumption that the date of satisfaction is the date of the order, it is then contended that there is a delay of four days from 2 August 2006 to 6 August 2006 which the Minister has to explain. Alternative it is contended that if the date of satisfaction is not the date of the issuance of the order, then the Minister is bound to expressly stipulate the date of his 'satisfaction' and explain any ensuing delay.

[24] The basis for these contentions follow from the reasoning of the Federal Court in *Kumaran Suppiah v. Dato' Noh Hj Omar & Anor* [2006] 4 CLJ 675 which stipulates in relation to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, that there should be no delay between the date of issuance of a detention order and the date when the detention order takes effect. This in turn is because it is a mandatory procedural constituent of the section that the Minister should act expeditiously where no specific time frame is specified. If no time frame is specified then the provisions of the Interpretation Act require the Minister to act with all requisite speed. Accordingly a delay between the date of issuance of the order and the date when the order is to take effect must be explained.

[25] This contention has been considered in full in Permohonan Jenayah No: 44-55 Tahun 2007, *Lim Siong v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* ('*Lim Siong*'s case') in the context of s. 4(1) of the Emergency (Public Order and Prevention of Crime Ordinance 5, 1969) which is similar to the latter limb of s. 6(1) of the Act. I adopt wholly the decision and grounds in that case here.

[26] The essence of the decision in *Lim Siong*'s case as applied to the instant case is that the second part or latter limb of s. 6(1) of the Act, provides a condition precedent to the exercise of discretion by the Minister in deciding whether or not to make a

detention order. In other words it provides that the Minister may direct by order that a person be detained but only if he is satisfied that it is in the interest of public order that such person be detained. The words ".. if he is satisfied that it is necessary in the interest of public order that such person be detained" circumscribe the conditions under which he can make such a detention order. The two are inseparable because the requirement of 'satisfaction' is the basis for the detention order. If this proviso or condition precedent is not met, then no detention order can be made. Accordingly the date of 'satisfaction' of the Minister is the date of issuance of the detention order.

[27] In other words it is only if the satisfaction of the Minister arose at a point of time other than the date when he issued the order that a gap would arise. As the date of satisfaction is a part of the issuance of the order, in that it merely prescribes a condition precedent, rather than setting out a separate step to be taken by the Minister, there is no such gap in time.

[28] It therefore follows that there is no requirement that the Minister set out or specify the date when he was 'satisfied' because it is the date of the detention order. It would therefore follow that there was a gap of some four days between the day when the Minister received the report from the inquiry officer on 2 August 2006 and the issuance of the order on 6 August 2006. There is no requirement that the Minister must make his decision on whether or not to exercise his discretion immediately upon receiving the relevant reports. That would attract the criticism of failing to give any adequate consideration to the reports which is a crucial part of the basis for his decision.

[29] If the contention is that a perusal of the affidavit suggests that the Minister received the reports and read them and was immediately satisfied, this is untenable as the affidavit does not provide so. For these reasons it is apparent that there is no breach of s. 6(1) of the Act and this ground fails.

[30] However on the basis of a breach of the procedural requirements of r. 3 of the Rules, this application for *habeas corpus* is allowed and the detainee is ordered to be released forthwith.